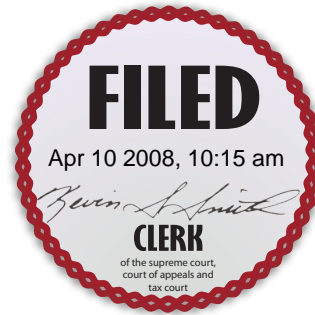


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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TIMOTHY DION HAMPTON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0708-CR-400

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Salvador Vasquez, Judge  
Cause No. 45G01-0503-MR-3

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**April 10, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Timothy Hampton appeals his conviction for Class D felony neglect of a dependent, as well as his thirty-seven year sentence for Class A felony battery. We affirm in part and reverse in part.

## **Issues**

The issues before us are:

- I. whether double jeopardy principles require vacation of the neglect conviction; and
- II. whether Hampton's sentence is appropriate.

## **Facts**

The evidence most favorable to the convictions reveals that in March 2005, Hampton was living off and on with his girlfriend, Felicia Gordon. They had one child together who lived at the house; two of Gordon's other children, A.R. and G.R., also lived there. G.R. was seven years old. On the evening of March 16, 2005, Hampton severely beat G.R., causing a massive laceration of G.R.'s liver and internal bleeding. Hampton and Gordon left G.R. in a bedroom. At about 7 a.m. the next morning, after Hampton had left for work, Gordon called 911. When emergency personnel arrived at the scene, they found G.R. dead. A pathologist estimated that he had died sometime the previous evening. An autopsy revealed that G.R. had suffered fifty-six notable injuries and a number of additional, less severe injuries. The lacerated liver was the primary cause of death.

After final amendments, the State charged Hampton with murder, Class A felony battery, and Class A felony neglect of a dependent. Hampton's first trial began on January 16, 2007, but a mistrial was declared because of the discovery of new evidence that Hampton had not had an opportunity to evaluate. After declaring a mistrial, the trial court also found Hampton in contempt of court for an outburst he had during a pretrial proceeding. As the trial court was announcing this finding, Hampton launched into another prolonged outburst, during which among other things he threw papers, called the trial judge a "motherf\*\*\*er," said "I'll be glad when the F.B.I. come in here and duct tape his f\*\*\*in mouth," said "I know how to deal with you," and said "F\*\*\* you, Vasquez." Tr. pp. 36, 37, 42, 44. As a result of this outburst, the trial court found Hampton in contempt two more times and imposed consecutive one-year sentences for each of the three contempt findings.

Hampton's second trial began on June 4, 2007. The jury found Hampton guilty of Class A felony battery, Class A felony neglect of a dependent, and Class B felony voluntary manslaughter as a lesser included offense of murder. The trial court merged the voluntary manslaughter conviction into the Class A felony battery conviction. It also reduced the Class A felony neglect conviction to a Class D felony. It then imposed a thirty-seven year sentence for the battery conviction and an eighteen-month sentence for the neglect conviction, to be served consecutive to each other and to the three-year sentence for the contempt findings. Hampton now appeals.

## Analysis

### *I. Double Jeopardy*

Hampton first argues that his convictions for both Class A felony battery and Class D felony neglect violate the Double Jeopardy Clause of the Indiana Constitution. That Clause, found in Article 1, Section 14 of the Indiana Constitution, “was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression.” Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Two or more offenses are the “same offense” in violation of the Indiana Double Jeopardy Clause, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Id. Under the “actual evidence” test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. at 53. To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish all of the essential elements of a second challenged offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). To determine what facts were used, we consider the evidence, charging information, final jury instructions, and arguments of counsel. Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

To convict Hampton of Class A felony battery, the State was required to prove that he, being at least eighteen years old, knowingly or intentionally touched G.R., a child

under fourteen years old, in a rude, insolent, or angry manner, and that such touching resulted in G.R.'s death. See Ind. Code § 35-42-2-1(a)(5). To convict Hampton of Class D felony neglect of a dependent, as the trial court reduced the charge that the State filed, the State was required to prove that G.R. was in Hampton's care, either voluntarily or by legal obligation, and that Hampton knowingly or intentionally placed G.R. in a situation that endangered his life or health. See Ind. Code § 35-46-1-4(a)(1).

It is true that where a caregiver severely batters a child, the State may prosecute the caregiver under the neglect statute rather than the battery statute. See Lloyd v. State, 669 N.E.2d 980, 984 (Ind. 1996); Eastman v. State, 611 N.E.2d 139, 141 (Ind. Ct. App. 1993). Whether the State may convict a defendant of both neglect and battery for the beating and injury or death to one child, however, is a closer question. In some cases, depending upon how the State has charged and prosecuted the defendant, he or she may be convicted of more than one crime associated with one child's death, where there is evidence the defendant both inflicted a fatal injury on the child and subsequently failed to seek medical treatment for the child. See Strong v. State, 870 N.E.2d 442, 444 (Ind. 2007). The defendant in Strong originally was convicted of both murder and Class A felony neglect of a dependent, and our supreme court reduced the neglect conviction to a Class D felony because of double jeopardy concerns, rather than vacating the conviction altogether. In Strong, however, the State specifically alleged in the charging information that the neglect charge was based upon the defendant allowing the child "to languish and

suffer without medical treatment knowing she had been gravely injured . . . .” Id. at 443.<sup>1</sup> As noted, the language of the charging information is an important factor in deciding whether a jury relied on the same facts to support two different convictions. See Rutherford, 866 N.E.2d at 871.

The State admits in its brief “that no attempt was made in the charging information, jury instructions, or argument at trial to distinguish which facts applied to which crime.” Appellee’s Br. p. 8. The charging information here, as well as the jury instructions, only generically advised the jury of the basic elements of Class A felony battery and neglect of a dependent. They did not allege that Hampton failed to seek medical care for G.R. after the beating or advise the jury that it could convict Hampton of neglect on the basis of such evidence. Moreover, the arguments of the prosecutors focused solely upon whether Hampton battered G.R. and whether that caused his death. There was never an attempt to differentiate facts that would support a battery conviction from those that would separately support a neglect conviction. On appeal, the State attempts to direct us to facts that could have done so. However, such after-the-fact

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<sup>1</sup> The State relies upon three other cases in its brief, none of which are relevant here. In Brown v. State, 770 N.E.2d 275, 277-81 (Ind. 2002), our supreme court affirmed convictions for both aiding in murder and neglect of a dependent, but there was no double jeopardy claim or analysis in the case. In Mitchell v. State, 726 N.E.2d 1228, 1244-45 (Ind. 2000), our supreme court affirmed the trial court’s reduction of a Class B felony neglect conviction to a Class D felony because of double jeopardy conflict with a murder conviction; however, it was the State who was appealing any reduction at all and the defendant did not argue for complete vacation of the neglect conviction. Finally, the State misstates our holding in Sanders v. State, 734 N.E.2d 646, 651-52 (Ind. Ct. App. 2000), trans. denied. Contrary to the State’s claim, we vacated the defendant’s Class C felony involuntary manslaughter conviction because of double jeopardy conflict with a conviction for Class B felony neglect of a dependent.

arguments are unavailing when considering an “actual evidence” double jeopardy claim. See Rutherford, 866 N.E.2d at 872.

The State also seems to be arguing that the jury reasonably could have considered different facts in convicting Hampton of both neglect and battery. However, the proper test is not whether there is a reasonable possibility the jury considered different facts to convict a defendant of two different crimes, but whether there is a reasonable possibility that it relied upon the same facts. Bradley v. State, 867 N.E.2d 1282, 1284 (Ind. 2007). Because of the manner in which the State formally charged and prosecuted this case, we are obligated to vacate Hampton’s conviction for Class D felony child neglect because there is a reasonable possibility the jury relied upon the same facts to establish all of the essential elements of that offense as well as all of the essential elements of Class A felony battery.

## ***II. Sentence***

Hampton next challenges the sentence he received, expressly limiting his argument to Indiana Appellate Rule 7(B) and whether the sentence is appropriate in light of the nature of the offense and his character. Although Rule 7(B) does not require us to be “extremely” deferential to a trial court’s sentencing decision, we still must give due consideration to that decision. Rutherford, 866 N.E.2d at 873. We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. “Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.” Id. After vacation of the neglect conviction, Hampton’s total sentence is forty years: thirty-seven for Class A felony battery, or seven years above

the advisory, and three years each for the three contempt findings, all served consecutively.<sup>2</sup>

Regarding the nature of the offense, Hampton savagely battered a seven-year-old boy with whom he enjoyed a position of trust. G.R. suffered extensive, multiple injuries, not just one injury. The primary fatal injury was gruesome, as G.R.'s liver was torn nearly in half over his vertebrae. G.R.'s then-nine-year old sister, A.R., witnessed the beating. Nothing regarding the nature of the offense suggests that a reduced sentence is warranted.

Regarding Hampton's character, he does not have an extensive criminal history; his only conviction is for misdemeanor operating a vehicle without a license, although he has a "conditional discharge" from a conviction in Illinois for unlawful possession of a firearm. App. p. 236. Nevertheless, Hampton's violent nature and complete disrespect and disregard for authority is amply demonstrated by the outburst in the record that led to two of the three contempt findings.

We further observe that although the trial court recognized that hardship to Hampton's dependent could potentially be a mitigator, we believe it is entitled to no weight in this case. Even if he received the minimum possible sentence for a Class A felony, twenty years, and received one-for-one credit for each day he was imprisoned, he still would be unable to support his dependent for ten years. More important, however, is that Hampton himself caused the ultimate hardship for another child in his care, by

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<sup>2</sup> Hampton does not directly challenge the contempt sentences, but does argue they should be served concurrent with his battery sentence.

mercilessly beating him and leaving him to die. Nothing in Hampton's character or the nature of the offense warrants a reduction of his sentence.

### **Conclusion**

In the present case, we are required to direct that Hampton's conviction for Class D felony child neglect be vacated on double jeopardy grounds. His remaining sentence is appropriate.

Affirmed in part and reversed in part.

CRONE, J., and BRADFORD, J., concur.